

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Harold Born (deceased)
Harold Born Estate
213 N State St
P O Box 488
Waseca MN 56093-0488

PECFA Claim #54843-9530-98
Hearing #96-11

Final Decision

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition for hearing filed June 23, 1995, under § 101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, now Department of Commerce, a hearing was commenced on August 8, 1996, at Madison, Wisconsin. A proposed decision was issued on November 26, 1996, and the parties were provided a period of twenty (20) days to file objections.

The issues for determination are:

- A. Whether the department's decision not to reimburse the appellant for various charges including fill dirt, backhoe, lab analysis, soil sample, employee charges for evaluation, and abatement was appropriate and reasonable;
- B. Whether the claimant at a hearing has the burden of proving not only that the basis for ineligibility were improper but also of proving general eligibility under the program.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Harold Bom (deceased)
Harold Bom Estate
213 N State St
Waseca MN 56093-0488
By: Rolf E. Iversen
Iversen Law Firm
213 North State Street
P O Box 488
Waseca MN 56093-0488

and By: Gregory G. Kipp
Mateffy Engineering
663 Old Hwy 8
New Brighton MN 55112-7767

Department of Commerce
201 East Washington Avenue
P.O. Box 7970
Madison WI 53707-7970
By: Kristiane Randal
Assistant General Counsel
P.O. Box 7969
Madison WI 53707-7969

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated February 6, 1997.

The matter now being ready for decision, I hereby issue the following

F I N A L D E C I S I O N

The attached Proposed Decision dated November 26, 1996, is hereby adopted as the final decision of the department with the following modifications:

The proposed Findings of Fact (page 2) ¶4 is modified to read:

"4. Soil samples were taken and sent for analysis to Spectrum Labs, Inc. The excavation site was refilled with clear fill. The soil which had been removed from the excavation site on June 25 was moved again on August 18, 1993 to a landfill."

The Proposed Discussion and Conclusions of Law and the Proposed Decision section (pp. 4 & 5) are deleted and replaced by the following:

PROPOSED DISCUSSION AND CONCLUSIONS OF LAW

The department denied reimbursement of one invoice from Bob Thompson & Sons, totalling \$714, and including \$178 for fill dirt, \$70 for gravel, \$110.50 for additional fill dirt \$300 for excavation equipment, and \$55 for plastic sheeting. Those amounts were denied on the basis that they were not competitively bid.

The claimant concedes that the above services were not competitively bid, but argues that competitive bids were not required because of the presence of an emergency. However, the evidence offered by the claimant does not establish that an emergency existed. Although there were clearly soil and water contamination problems which needed to be addressed, those problems were not qualitatively or quantitatively different from other situations requiring remedial action. Moreover, even if an emergency existed, there is no basis in the statutes and rules relating to PECFA claims which authorizes waiver of the bidding requirement set forth in ILHR 47.33 on the basis of an emergency. Finally, the claimant and/or his agents never sought a departmental determination that an emergency existed. Therefore, the above services are not eligible for reimbursement.

The department denied reimbursement of a second invoice from Bob Thompson & Sons on the basis that the costs on that invoice were associated with tank removal. The claimant continues to assert that a backhoe charge of \$225 from that invoice should be reimbursed.

The backhoe costs on the above invoice were distinct from the tank removal costs, which were separately billed. The \$225 cost related to excavating a larger area than would have been required for mere tank removal. This over-excavation was necessitated in order to remove contaminated soil, not to remove the tank itself. The department has raised the issue of whether this excavation cost, while related to remediation, was nevertheless ineligible because it was not bid. Section ILHR 47.33(l)(b)l, Wis. Adm. Code. This issue was not addressed by the claimant at the hearing.

The hearing herein is a "de novo" hearing. At the hearing the claimant has the burden of proving that the denied costs are in fact eligible. *See Danco Prairie FS Cooperative* (PECFA Claim Number 53578-9617-50, decided October 17, 1994). Unless an element of eligibility is conceded by the department at the hearing, that element remains an element of proof for the claimant. The department is not required to state in the "Breakdown of PECFA Costs" each and every reason of eligibility which the claimant has failed to meet. It is only required to give some kind of notice of the reasons for ineligibility. The PECFA program is not an entitlement program such as Aid to Families With Dependent Children or General Relief. It is an insurance program. The strict notice requirements under the 'due process' clause of the U.S. Constitution that apply to entitlement programs are not as inherently necessary in an insurance program such as the PECFA program.

It would appear under the present circumstances that in order to preserve the integrity of the hearing process to all parties it is required that the matter of whether the \$225 in backhoe charges were otherwise eligible should be determined at a future hearing. This will give all parties an opportunity to prepare and present their respective positions.

The department denied reimbursement of an invoice from Spectrum Labs, Inc., for lab analysis of water and soil samples, in the amount of \$560, on the basis that the costs were associated with tank removal. The department now argues in addition that there was a failure to seek competitive bids for such testing.

The analysis referred to above was a reasonable part of the remediation efforts, required to determine the effect of petroleum leakage on water supplies and ultimately on public safety. The department has not shown them to be related to the tank closure itself. Similarly to the matter of the \$225 of backhoe charges the claimant has not had an opportunity to prove that these charges were otherwise eligible especially in view of the department's objection that the charges were not bid as required under Section ILHR 47.33, Wis. Adm. Code. Again, the claimant has the burden of proving eligibility, not simply rebutting the department's basis of ineligibility. It would be appropriate and fair under the circumstances to continue this hearing to a time when the claimant may put forth evidence that they are otherwise eligible for reimbursement by the PECFA program.

The department denied reimbursement of an invoice from B & D Services in the amount of \$4987.13 on the basis that the services had been performed "prior to the establishment of a reimbursement maximum", or prior to submission and approval of a remediation plan.

The claimant contracted for the above services before submitting a remedial action plan to the department, and thus before a reimbursement maximum was established. The services were in relation to the second move of the contaminated soil, from its temporary site on the Born property (away from the excavation) to its final landfill location. That work was not part of any emergency, even if an emergency had existed earlier, since the situation had already been stabilized by the first soil move. There is no other basis for the claimant's attempt to have the charges approved when they were undertaken prior to the approval of any remedial action plan. This situation, in which work was performed in the absence of an emergency, and prior to submission and approval of a remediation plan, is analogous to the situation in the Ewer case cited in the department's brief. Therefore, denial of reimbursement for those costs was appropriate.

The department also denied reimbursement of a portion of an invoice from Mateffy, amounting to \$516.50, covering services of its employees, on the basis that the costs were associated with tank closure. The claimant has established through testimony of the engineer on site that his time was related to evaluation and abatement procedures and was not a function of tank removal, which was a separately billed item. The department has not rebutted that testimony. The department has raised the issue that these charges were not bid as required by ILHR 47.33. The claimant did not have an opportunity to address this issue at the hearing. Like the matter of the \$225 in backhoe charges and the \$560 of lab charges, it is necessary that the claimant herein prove that they are otherwise eligible for reimbursement under Section ILHR 47.33. As with the previous two charges the claimant will have the burden of proving eligibility for reimbursement at that future hearing.

The department finally denied reimbursement of another Mateffy invoice in the amount of \$174, again on the basis that the costs were associated with tank closure. The invoice specifically codes the \$174 as "soil treatment management", three hours. Those costs, like those for the B & D Services noted above, were incurred prior to the remedial action plan, and are ineligible for reimbursement on that same basis.

The state hearing officer therefore finds that the department was correct in denying reimbursement of \$714 for services of Bob Thompson & Sons, on the basis that those services were not competitively bid as required.

The state hearing officer further finds that the department was correct in denying reimbursement for \$4987.13 for services of B & D Services and of \$174 for services of Mateffy Engineering for soil treatment because that work was performed prior to the remedial action plan process.

PROPOSED DECISION

The department's decision to deny reimbursement in the amount of \$6256.13 is hereby affirmed. The department's decision denying reimbursement of \$225 in backhoe charges; \$560 for Spectrum Labs, Inc.; and of Mattefy Engineering, Inc. in the amount of \$516.50 is remanded for further hearing at which hearing the claimant shall have the burden of proving such amounts are otherwise eligible under ILHR 47.33, Wis. Adm. Code.

* * * *

Note: The hearing officer's findings of fact, with the exception of a clerical error noted herein, are left undisturbed. The remand herein is required as a matter of law only.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Commerce, Office of Legal Counsel, P. O. Box 7969, Madison, WI 53707-7969.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after image of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 123 W. Washington Avenue, 9th Floor, P. O. Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: March 13, 1997

Christopher C. Mohrman, Executive Assistant
Department of Commerce
P O Box 7970
Madison WI 53707-7970

cc: Parties in Interest and counsel

Date Mailed: 3/13/97

Mailed By: Jan Mc Fadden Kirkland